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# I-Arbitration: Not the Newest Apple(R) Product, But Sharia Law in International Commercial Arbitration

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# I-ARBITRATION: NOT THE NEWEST APPLE<sup>®</sup> PRODUCT, BUT SHARIA LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

Thomas Panighetti \*

## I. INTRODUCTION

Today, Muslims constitute 23% of the world's total population, totaling nearly 1.6 billion Muslims.<sup>1</sup> Population estimates project that, by 2030, Muslims will constitute 26.4% of the world's inhabitants.<sup>2</sup> Many Islamic countries are governed by Sharia law (Islamic law), but many Muslims who do not live in those countries still desire to comply with Sharia law, including their commercial transactions.<sup>3</sup> As the world's Muslim population grows, international legal institutions must adapt to provide workable solutions for commercial transactions that facilitate the application of Islamic law. Sharia law is often viewed negatively in the West because Sharia's criminal laws are seen as draconian; however, Sharia's criminal laws can be applied separately from its financial and other civil laws.<sup>4</sup>

Malaysia's arbitral institution, the Kuala Lumpur Regional Centre for Arbitration (KLRC), recently enacted "i-Arbitration Rules" which allow arbitrating parties to use Sharia law to resolve their international commercial arbitration disputes. The "i" in i-Arbitration is not an attempt to make the rules seem like a new Apple<sup>®</sup> product, but the letter "i" is recognized in the Islamic world as a signal that a product or service is Sharia-compliant.<sup>5</sup>

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<sup>1</sup> *The Future of the Global Muslim Population; Projections for 2010-2030*, PEW RESEARCH CENTER (Jan. 27, 2011), <http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx> (stating that estimated population of Muslims in the world in 2010 was 1,619,314,000 people).

<sup>2</sup> *See id.* (stating that in 2030 the estimated population of the world will be 8.3 billion people, of which 2.2 billion are expected to be Muslim).

<sup>3</sup> Christopher F. Richardson, *Islamic Finance Opportunities In The Oil And Gas Sector: An Introduction To An Emerging Field*, 42 TEX. INT'L L.J. 119, 123 (explaining that "Islamic finance is no longer just a novelty--"[i]t's mainstream business . . . [and] [t]hat's why every bank wants a bigger piece of it.").

<sup>4</sup> *See generally* Laurie Roth, *Sharia Law Must Be Outlawed In The U.S.*, RENEW AMERICA (Oct. 26, 2012), <http://www.renewamerica.com/columns/roth/121026>; Candice Lanier, *The Rampant, Dangerous & Unchecked Spread of Sharia Finance in the U.S.*, LIBERTY NEWS NETWORK (June 25, 2012), <http://www.libertynews.com/tag/islamic-law/> (last visited Apr. 6, 2013).

<sup>5</sup> Paula Hodges, Charles Kaplan & Peter Godwin, *KLRC's New I-Arbitration Rules: A New Option For Islamic Finance Parties*, HERBERT SMITH FREEHILLS LLP (Oct. 11, 2012), <http://www.lexology.com/library/detail.aspx?g=f95ce493-1569-4011-8a90-9d560cb13b48> (last visited Apr. 6, 2013).

Malaysia, the world's largest Islamic bond market and center of Islamic finance, continues to open its legal markets to outside investment from foreign firms.<sup>6</sup> Many countries in Asia are competing to increase the number of Islamic finance parties who use their country for neutral dispute resolution.<sup>7</sup> Malaysia sought an advantage over its competition by adopting the i-Arbitration Rules, which provide for Sharia law to be used in commercial arbitration disputes and enforced in 146 countries under the New York Convention.<sup>8</sup>

On September 20, 2012, the KRLCA enacted its i-Arbitration Rules for international commercial arbitration disputes with Sharia law issues.<sup>9</sup> The i-Arbitration Rules are almost identical to the KLRCA Arbitration Rules enacted in July of 2012, except that i-Arbitration adds Rule 8. Rule 8 allows for the arbitral tribunal to send Sharia law issues to a Sharia expert or an approved Sharia advisory council<sup>10</sup> to determine the relevant Sharia principles that should apply. The rule provides for the logistics of choosing who will review Sharia law, how the costs will be distributed, and whether the arbitral tribunal can continue on non-Sharia issues while the Sharia expert or council make their determinations. The i-Arbitration Rules maintain the KLRCA's focus on preserving the court's non-interventionist and pro-enforcement stance on arbitral proceedings.<sup>11</sup>

Malaysia adopted these rules both for domestic and international disputes because 60% of Malaysia's 29 million people are Muslim, and the rules help attract Islamic finance and commercial parties to the country.<sup>12</sup> Malaysia is located near the Strait of Malacca, a vital sea trade lane for oil, which connects the Indian Ocean with the Pacific Ocean.<sup>13</sup> The Strait of Malacca is the shortest route for Middle East oil to reach the growing Asian markets, which makes Malaysia a logical location for dispute resolution for Middle East oil producers and Asian energy purchasers.<sup>14</sup>

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<sup>6</sup> Marianne Purzycki, *Malaysia: New Financial Center, New Legal Market Reforms*, HILDEBRANDT INSTITUTE (Aug. 1, 2012), <http://hildebrandtblog.com/2012/08/01/malaysia-new-financial-center-new-legal-market-reforms/> ("With the world's biggest Islamic bond market, Kuala Lumpur hopes to create a hub for both Islamic and conventional finance ... Malaysia is also enacting measures to open up its legal market to foreign firms, similar to liberalization efforts already underway in other parts of Asia, such as Singapore and Korea.").

<sup>7</sup> Hodges et al., *supra* note 5.

<sup>8</sup> *See id.*

<sup>9</sup> Clemmie Spalton, *KLRCA to Unveil Islamic Arbitration Rules*, GLOBAL ARBITRATION REVIEW (Sept. 17, 2012), available at [http://www.rcakl.org.my/userfiles/File/\(GAR\)%2017-9-12%20KLRCA%20Islamic%20arbitration.pdf](http://www.rcakl.org.my/userfiles/File/(GAR)%2017-9-12%20KLRCA%20Islamic%20arbitration.pdf) (last visited Apr. 6, 2013).

<sup>10</sup> KLRCA i-Arbitration Rules, Rule 8, (Sept. 20, 2012) available at [http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA\\_i-Arbitration\\_Rules.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA_i-Arbitration_Rules.pdf) ("'Council': means the shariah Advisory Council so established by the Central Bank under Central Bank Act 2009 or the shariah Advisory Council established by the securities Commission under the securities Commission Act 1993.").

<sup>11</sup> KLRCA, *Launch of the Revised KLRCA Arbitration Rules*, KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION, <http://www.klrca.org.my/scripts/list-posting.asp?recordid=271> (last visited Apr. 6, 2013).

<sup>12</sup> *Malaysia: People*, CENTRAL INTELLIGENCE AGENCY FACTBOOK (October 16, 2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>.

<sup>13</sup> *World Oil Transit Chokepoints*, U.S. ENERGY INFORMATION ADMINISTRATION (Aug. 22, 2012), <http://www.eia.gov/countries/regions-topics.cfm?fips=WOTC&trk=p3>.

<sup>14</sup> *Id.*

## II. WHAT IS SHARIA LAW AND WHAT IS ISLAMIC FINANCE LAW?

Sharia is a law derived from the Islamic holy book, the Qur'an, and from Islamic scholars' interpretation of the tradition left by the Prophet Mohammed.<sup>15</sup> Sharia law embraces many principles of Western law traditions such as the right of women to own property, the prohibition of illegal drugs, the right to privacy, the presumption of innocence, and that precedential value of legal decisions.<sup>16</sup> However, Sharia differs because it prohibits consuming alcohol, prohibits charging interest on loans (*Riba*),<sup>17</sup> and punishes some crimes with flogging, stoning, or cutting off the criminal's hands or feet.<sup>18</sup> Islamic law is a paternalistic form of law that, in some circumstances, works to provide social justice by restricting freedoms like the freedom of contract.<sup>19</sup>

*Riba* is an Islamic concept from the Quran that is interpreted by scholars to mean either a ban on charging any interest on a loan or a ban on usury, although most Islamic scholars believe it bans both.<sup>20</sup> The goal of *riba* was to protect poor consumers from being taken advantage of by wealthy businessmen who did no actual labor;<sup>21</sup> however, the actual result is that poor people could not borrow money because there was no benefit to lending. Therefore, Islamic banks created Sharia-compliant financial instruments that do not explicitly charge interest, such as amortized loans. While these instruments do not bear interest, many Sharia experts see such creative designs as violating the purpose of the laws. One of those creative instruments is the amortized loan, where the lender combines the principal and the total interest of the loan and divides it into equal payments over a set period. Another instrument is the profit and loss sharing approach called *Bai Muajjal* where a bank purchases the goods on behalf of the buyer from the seller and sells them to the buyer at a profit, allowing the buyer to make installment payments on the goods.<sup>22</sup>

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<sup>15</sup> Richardson, *supra* note 3, at 123 (explaining that "Islamic finance rules are taken from the Muslim holy book (called the Qur'an) and from other traditions ascribed to the Prophet Mohammed (called the Sunna or Hadith), as interpreted throughout the centuries by Islamic scholars.").

<sup>16</sup> Helen Ziegler, *Shariah Law*, HELEN ZIEGLER & ASSOCIATES (November 5, 2012 7:30pm), <http://www.hziegler.com/articles/Sharia-law.html>.

<sup>17</sup> Billy Hallowell, *Muslim Bank Launches Shariah-Compliant Mastercard with Compass Pointing Toward Mecca*, THE BLAZE (Oct. 15, 2012), <http://www.theblaze.com/stories/mastercard-launches-Sharia-h-compliant-credit-card-with-compass-pointing-toward-mecca/>.

<sup>18</sup> Ziegler, *supra* note 16.

<sup>19</sup> Nicholas C. Dau-Schmidt, *Forward Contracts--Prohibitions On Risk And Speculation Under Islamic Law*, 19 IND. J. GLOBAL LEGAL STUD. 533, 547 (2012) (explaining how "[a]s opposed to Western forward contracts that allow people to engage in risky and uncertain contracts, Islamic law takes a more paternalistic approach and proscribes safer contracts. This has the effect of both protecting followers of Islam but also restricting their freedom to contract.").

<sup>20</sup> Shamim Ahmad Siddiqui, *Understanding and Eliminating Riba: Can Islamic Financial Instruments be Meaningfully Implemented?*, 1 UNIV. OF BRUNEI DARUSSALAM J. OF MGMT. AND SOC. SCI. 187, 189 (Autumn 2005), available at [http://www.biztek.edu.pk/downloads/research/jmss\\_v1\\_n2/v1n2\\_187-203.pdf](http://www.biztek.edu.pk/downloads/research/jmss_v1_n2/v1n2_187-203.pdf) (last visited Apr. 6, 2013).

<sup>21</sup> *See id.*

<sup>22</sup> *Bai Muajjal*, Q FINANCE, <http://www.qfinance.com/dictionary/bai-muajjal> (last visited Nov. 5, 2012 8:30pm) (stating that the definition of *Bai Muajjal* is "a sale of goods in which a bank purchases the goods on behalf of the buyer from the seller and sells them to the buyer at a profit, allowing the buyer to make installment payments.").

Despite the restrictions that Islamic law imposes on financial transactions, companies and countries around the world are working to facilitate Sharia-compliant financial transactions. An Islamic bank, Al Hillal Bank, recently released a Sharia-compliant Mastercard that does not accrue interest, but rather charges fees based upon usage.<sup>23</sup> The Mastercard also contains a built in compass that points to Mecca.<sup>24</sup> Just as there is a Sharia-compliant Mastercard for Islamic consumers, countries are changing their alternative dispute resolution laws to attract international Islamic commercial financial disputes for resolution in their host country.

### III. HOSTILITY TOWARDS SHARIA LAW

While many countries are attempting to capitalize on the growth of Islam and the market for Islamic goods and services, other countries react to the growth in Islam with anti-Muslim rhetoric and actions. In the United States, the mere utterance of the word “Sharia” tends to evoke passionate emotional responses that arise from the memories of the terrorist attacks of September 11<sup>th</sup>, 2001, and images of the Taliban. In some U.S. states, this anti-Muslim and anti-Islam rhetoric was the catalyst for legislation that forbids courts from applying Sharia law.<sup>25</sup> Oklahoma was the first state to hold a voter referendum<sup>26</sup> that successfully passed a constitutional amendment banning the judiciary of Oklahoma from using any international law in its decisions.<sup>27</sup> The amendment declared that Sharia law was an international law that Oklahoma should not use in its jurisdiction. The amendment mentioned Sharia law on two occasions, while no other international law was specifically mentioned.<sup>28</sup> The Oklahoma law was challenged, and the Tenth Circuit Court of Appeals held that the amendment was unconstitutional because it infringed on the establishment clause of the First Amendment.<sup>29</sup> In First Amendment

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<sup>23</sup> Hallowell, *supra* note 17.

<sup>24</sup> *See id.*

<sup>25</sup> *See* Awad v. Ziriax, 670 F.3d 1111, 1132 (10th Cir. 2012).

<sup>26</sup> *See id.* (stating the language voters saw “This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. *It forbids courts from considering or using Sharia Law.* International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties. *Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teachings of Mohammed.* SHALL THE PROPOSAL BE APPROVED?”) (emphasis in original).

<sup>27</sup> *See id.* at 1117-18 (“The Courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall *not look to* the legal precepts of other nations or cultures. Specifically, the courts *shall not consider international law or Sharia Law*. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.”) (emphasis in original).

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 1132.

challenges such as this, the court applies a strict scrutiny standard that requires the government to show it has a compelling government interest for the law.<sup>30</sup> The Tenth Circuit determined that Oklahoma did not have a compelling interest in the law that outweighed the damage that enforcement of the law would do to Muslims.

In contrast to the Tenth Circuit's ruling, U.S. legal scholars have noted that there is no actual threat that judges will apply of Sharia law in the courts of the United States because the U.S. Constitution and the 50 state constitutions are the basis of law in those states.<sup>31</sup>

#### IV. SPECIFIC PROVISIONS OF I-ARBITRATION

The i-Arbitration rules added Rule 8 "Procedure for Reference to Sharia Advisory Council or Sharia Expert"<sup>32</sup> to the KLRCA July 2012 rules. Rule 8 makes several major changes to the KLRCA July 2012 Rules which the KLRCA believes will benefit Islamic parties. First, the i-Arbitration rules allows for parties, who have agreed to arbitrate under Islamic law, to use a Sharia expert or advisory council to make determinations on Islamic law issues.<sup>33</sup> Second, it allows for the arbitral tribunal either to adjourn the arbitral proceedings until the Sharia expert or advisory council makes their determination or to continue on other non-Sharia areas of the dispute while the Sharia expert or advisory council rules.<sup>34</sup> Third, Rule 8 provides that the cost of the Sharia expert or advisory council are included in the costs of arbitration.<sup>35</sup> Finally, Rule 8 sets out a specific timetable for the Sharia expert or the advisory council to make the Sharia determination.<sup>36</sup>

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<sup>30</sup> See *id.* at 1127.

<sup>31</sup> Kari Huus, *Federal Court Deals Blow to Anti-Shariah Efforts*, NBC NEWS (Jan. 10, 2012), [http://usnews.nbcnews.com/\\_news/2012/01/10/10097954-federal-court-deals-blow-to-anti-Sharia-h-efforts?lite](http://usnews.nbcnews.com/_news/2012/01/10/10097954-federal-court-deals-blow-to-anti-Sharia-h-efforts?lite).

<sup>32</sup> KLRCA i-Arbitration Rules, Rule 8, (September 20, 2012) available at [http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA\\_i-Arbitration\\_Rules.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA_i-Arbitration_Rules.pdf).

<sup>33</sup> See *id.* Rule 8 § 1(a-b) ("1. subject to paragraph 2 below, whenever the arbitral tribunal has to:- a) Form an opinion on a point related to shariah principles; and b) decide on a dispute arising from the shariah aspect of any agreement which is based on shariah principles; The arbitral tribunal shall refer to the matter to the relevant Council for its decision, setting out the relevant information as the relevant Council may require in forming its opinion including the question or issue so referred, the relevant facts, issues and the question to be answered by the relevant Council. The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate and without prejudice to the generality of the foregoing may, unless all parties to the arbitration otherwise agree, limit the time available for each party to present its case.").

<sup>34</sup> See *id.* Rule 8 § 3 ("The arbitrator shall then adjourn the arbitration proceedings until the ruling has been given by the relevant Council or shariah expert, as the case may be, or if there are any other areas of dispute which are independent of the said ruling, shall proceed to deliberate on such areas which are independent of the said ruling.").

<sup>35</sup> See *id.* Rule 10, § 1(b) ("1. The term "costs" as specified in Article 40 of the UNCITRAL Arbitration rules shall include the: [Rule 10 § 1(a) omitted]; and b) expenses reasonably incurred by the arbitral tribunal in connection with the reference to shariah Advisory Council or shariah expert under rule 8.").

<sup>36</sup> See *id.* 8, § 5 ("The relevant Council or shariah expert shall deliver its ruling within the period of thirty (30) days from the date the reference is made. Within fifteen (15) days upon receiving the ruling, the arbitrator shall apply the ruling when deciding the dispute and giving the award.").

Interestingly, two of the rules from the KLRCA July 2012 Rules were not modified to include reference to the Sharia expert or council in the i-Arbitration Rules, which could potentially cause conflict. The rule on confidentiality, Rule 13, is identical to Rule 12 in the KLRCA July 2012 Rules, but it does not explicitly require the Sharia expert or advisory council to maintain confidentiality.<sup>37</sup> Additionally, Rule 15 of i-Arbitration states that writings or statements during arbitration proceedings cannot constitute slander, defamation, libel, or any other complaint between the parties and the arbitral tribunal, once again leaving out whether Sharia experts or advisory councils may have a cause of action.

The KLRCA recommends that the parties seeking i-Arbitration incorporate the model i-Arbitration Rules by referencing them in their arbitral clause.<sup>38</sup> Parties that agree to i-Arbitration must accept both the use of Sharia law as the governing law of the arbitration and the added expense of the Sharia expert or advisory council (if one is needed).<sup>39</sup>

#### *A. Rule 8: The Role of Sharia Experts and Advisory Councils*

The i-Arbitration rules allow an arbitral tribunal to refer any matter beyond the purview of the arbitrators to either a Sharia expert or the advisory council<sup>40</sup> to form an opinion and render a decision on the issues from Sharia principles.<sup>41</sup> The arbitral tribunal may adjourn the proceedings while the Sharia expert or advisory council examines the Sharia law issue.<sup>42</sup> If the parties do not agree on which expert or advisory council should make the determination, the arbitral tribunal will appoint an authority to make the

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<sup>37</sup> See *id.* Rule 13; Hodges et al., *supra* note 5 (“Rule 13 obliges the tribunal, parties and KLRCA to keep confidential all matters relating to the arbitration proceedings. It does not extend to the Council or expert.”).

<sup>38</sup> KLRCA i-Arbitration Rules, Islamic Model Arbitration Clause (Sept. 20, 2012), available at [http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA\\_i-Arbitration\\_Rules.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA_i-Arbitration_Rules.pdf) (“Any dispute, controversy or claim arising out of a commercial agreement which is based on Sharia principles or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with KLRCA i-Arbitration Rules.”).

<sup>39</sup> See *id.* Rule 10 § 1(b).

<sup>40</sup> See *id.* Rule 8, § 2 (“2. Whenever the arbitration relates to a dispute on a shariah aspect of a commercial agreement which is based on shariah principles that is beyond the purview of the relevant Council and the arbitrator has to form an opinion on a point related to the shariah principles and decide on a dispute arising from the shariah aspect, the arbitrator shall refer the matter to a shariah expert or council to be agreed between the parties, setting out relevant information as the shariah expert may require to form its opinion including the question or issue so referred, the relevant facts, issues and the question to be answered by the shariah expert. Where the parties fail to agree to a shariah expert or council, the provisions relating to experts appointed by arbitral tribunal under Article 29 shall apply.”).

<sup>41</sup> See *id.* Rule 8, § 1(a-b).

<sup>42</sup> The Sharia experts and advisory councils are not allowed to make discovery findings or to apply their ruling to any matter of fact; rather, the arbitrators remain the fact finders who apply the law that the Sharia experts or council discerns. See *id.* Rule 8 § 6 (“For avoidance of doubt, the ruling of the relevant Council or the shariah expert may only relate to the issue or question so submitted by the arbitral tribunal and that the relevant Council or the shariah expert shall not have any jurisdiction in making discovery of facts or in applying the ruling or formulating decision relating to any fact of the matter which is solely for the arbitral tribunal to determine.”).

decision.<sup>43</sup> While the intention of this law is to make Islamic law arbitration functional in the international commercial world, this law presents its own challenges.

A party may not agree with the arbitral tribunal's decision to send an issue to Sharia experts or advisory council, and the law provides no indication whether such a decision is appealable. Additionally, if the arbitral tribunal is not proficient in Islamic law, the tribunal may waste the parties' resources by sending issues that do not implicate Sharia law principles to the Sharia expert or advisory council. Rule 8 allows for the arbitral tribunal to be adjourned for up to 45 days – 30 days for the Sharia expert or council to render a decision and an additional 15 days for the arbitral tribunal to resume activities.<sup>44</sup> Therefore, a party may be able to delay for up to 45 days by demanding issues be sent to a Sharia expert or advisory council. However, a party will have a difficult time abusing this delay because the arbitral tribunal makes the decision on whether to send an issue to Sharia experts and on when to reconvene. The tribunals are unlikely to delay arbitration multiple times for the full 45 days, because that could tarnish the arbitrator's reputation or show bias in the proceedings.

### *B. Rule 14: Confidentiality*

i-Arbitration may not be as confidential as other arbitration proceedings. Confidentiality is one of the major reasons that parties choose arbitration, so if confidentiality is not guaranteed, some parties may opt for arbitration that is confidential, but not Sharia-compliant, therein removing Malaysia's niche from the party's consideration. Under the KLRCA July 2012 Rules, every party involved is held to confidentially with exception of what is required to enforce the arbitral award.<sup>45</sup> While i-Arbitration's Rule 13 retains the exact language of the KLRCA July 2012 Rule 12, i-Arbitration involves an additional party that is not explicitly mentioned in Rule 13: the Sharia expert or advisory council.<sup>46</sup> The confidentiality provision states that the "arbitral tribunal, the parties and the KLRCA shall keep confidential all matters relating to the arbitral proceedings."<sup>47</sup> While there is no precedent on whether Sharia experts and council are bound to confidentiality, it is likely that the KLRCA will decide they are bound to confidentiality because confidentiality is a necessity in arbitral proceedings.

If the KLRCA intended to bind the experts and advisory councils to confidentiality, the KLRCA could have easily included them in the text of Rule 13. As the rule currently stands, no plain-meaning interpretation includes the expert or advisory councils as one of the three parties that are bound to confidentiality. It is not clear whether the experts or the council would actually breach confidentiality or how frequently breaches would occur.

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<sup>43</sup> See *id.* Rule 8 § 2.

<sup>44</sup> See *id.* Rule 8 § 5.

<sup>45</sup> Hodges et al., *supra* note 5; The KLRCA Arbitration Rules, Rule 12 (July 1, 2012) available at [http://klrca.org.my/userfiles/File/KLRCA\\_Arbitration\\_Rules\\_Revised.pdf](http://klrca.org.my/userfiles/File/KLRCA_Arbitration_Rules_Revised.pdf).

<sup>46</sup> See *id.*; KLRCA i-Arbitration Rules, Rule 13 (Sept. 20, 2012), available at [http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA\\_i-Arbitration\\_Rules.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/KLRCA_i-Arbitration_Rules.pdf) ("The arbitral tribunal, the parties and the KLRCA shall keep confidential all matters relating to the arbitral proceedings. Confidentiality extends also to any award, except where its disclosure is necessary for purposes of implementation and enforcement.").

<sup>47</sup> See *id.*



### *C. Rule 15: Non-Reliances*

Similar to the rule on confidentiality, i-Arbitration Rule 15 and KLRCA July 2012 Rule 14 concerning “Non-Reliances” use language that only binds the parties and arbitral tribunal, leaving the potential for the Sharia expert or advisory council unbound by this provision. The “Non Reliances” rule provides that statements or writings during arbitration proceedings cannot constitute slander, defamation, libel, or any other complaint between the parties and the arbitral tribunal.<sup>48</sup> The Sharia expert or council would be the only party with a cause of action because the parties and arbitral tribunals agreed not to pursue any causes of action listed in Rule 15.

Additionally, if such an incident were to arise, it is not clear whether the “Non Reliance” provision would apply because the provision applies to matters “in the course of the arbitral proceeding.” The i-Arbitration rules do not state whether the Sharia expert or advisory council is included in arbitral proceedings because the proceedings can be adjourned when they analyze the Sharia issue. Unless this rule is changed to reflect the Sharia expert and advisory council, parties and arbitral tribunals could face be sued unless all three groups agree to waive any causes of action arising from the Sharia expert’s or advisory council’s participation. A contract between only two of those parties could potentially open up litigation from the non-included party.

## **V. CONCLUSION**

Malaysia is poising itself to attract Islamic commercial transaction disputes with i-Arbitration. While individuals may view Sharia law negatively in some parts of the world, countries like Malaysia are wise to gain a foothold in solving Islamic commercial disputes because the number of Muslims is projected to increase as a proportion of the world’s population. The new KLRCA i-Arbitration rules allow Muslims to choose Islamic law as the law of choice in their private contracts, and therefore to have their disputes resolved in accordance with their religious beliefs in 146 countries around the world. These i-Arbitration rules have the potential to attract more parties to resolve their disputes in Malaysia, but the KLRCA may need to refine the rules to include Sharia experts and advisory councils in the confidentiality and non-reliances provision to ensure that i-Arbitration is a commercially viable dispute resolution.

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<sup>48</sup> See *id.* Rule 15; The KLRCA Arbitration Rules, Rule 14 (July 1, 2012) *available at* [http://klrca.org.my/userfiles/File/KLRCA\\_Arbitration\\_Rules\\_Revised.pdf](http://klrca.org.my/userfiles/File/KLRCA_Arbitration_Rules_Revised.pdf) (“The parties and the arbitral tribunal agree that statements or comments whether written or oral made in the course of the arbitral proceedings shall not be relied upon to institute or commence or maintain any action for defamation, libel, slander or any other complaint.”).